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SUPREME COURT, U.S.

No.06-0464

In the Supreme Court of the United States

The State of Ohio, Petitioner,

v.

Stephen F. Farris, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

REPLY BRIEF FOR THE STATE OF OHIO

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REPLY BRIEF FOR THE STATE OF OHIO

1. The critical reason why this Court should grant the petition is that the circuit courts and state supreme courts are divided on whether a failure to give the warnings required by *Miranda v. Arizona*, 384 U.S. 436 (1966) mandates suppression when there is no police strategy to omit the warning. This case presents a perfect vehicle to review this important and reoccurring issue.

As the petition explains (at 12-13), the holding by the Supreme Court of Ohio directly conflicts with decisions of the Fourth and Seventh Circuits, which have held that when determining if post-*Miranda* warning statements made in a two-part interrogation are admissible, a court is to apply *Oregon v. Elstad*, 470 U.S. 298 (1985), unless a deliberate two-step strategy was employed. *See U.S. v. Mashburn*, 406 F.3d 303 (4th Cir. 2005) ("Kennedy's opinion therefore represents the holding of the *Seibert* Court: The admissibility of postwarning statements is governed by *Elstad* unless the deliberate 'question-first' strategy is employed."); *United States v. Stewart*, 388 F.3d 1079 (7th Cir. 2005) ("Where the initial violation of *Miranda* was not part of a deliberate strategy to undermine the warnings, *Elstad* appears to have survived *Seibert*."). The petition also demonstrates (at 12-13) that the Supreme Court of Ohio's decision is out of line with several other decisions, including cases from the Eighth Circuit, Kentucky, and New York. This demonstrates the confusion caused by *Missouri v. Seibert*, 542 U.S. 600 (2004). As explained in the Petition and below, because of the issue's reoccurring nature and its importance to police officers, citizens, and the courts, this conflict warrants this Court's resolution.

2. Respondent presents three arguments for denying review. Respondent contends that (1) the State exaggerates the extent and importance of any disagreement among the courts (Br. in

Opp. 8-14); (2) this case presents a poor vehicle for answering the question presented (Br. in Opp. 14-17); and (3) the Supreme Court of Ohio correctly held that respondent's statements should be suppressed (Br. in Opp. 18-21). None of those contentions have merit.

a. The petition discusses (at 14-16) the relevant holdings of this Court that support the conclusion that suppression is not warranted when there is no deliberate use of the two step interrogation strategy and no deliberate coercion. As noted above, at least two circuits have directly concluded that this is *Seibert*'s holding.[1] Several other courts have agreed with them. Pet. App. at 12-13. The Supreme Court of Ohio, however, disagrees (it appears Vermont and Louisiana also disagree). Pet. App at 11-12.

The Respondent takes great pains in attempting to show that the conflict does not matter or will only change a small number of cases. If that were true, however, it is unlikely that the members of this Court's plurality and Justice Kennedy would have written 3 opinions covering 18 pages of the United States Reports to discuss the issue in *Seibert*. If the conflict were meaningless, Justice Kennedy could have just joined Justices Stevens, Souter, Ginsburg, and Breyer to create a clear majority. He did not do this, and they did not join him. The members of the Court that understood the conflict in the approach is real, and it is important. Further, if the conflict were meaningless, lower courts would not be spending time trying to figure out how to apply *Seibert* and determine which opinion should be followed. *See*, Pet. at 9-13.

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[1] Contrary to Respondent's contention, the Seventh Circuit's determination is part of its holding because it is a necessary part of the remand instructions.

Respondent also argues that the Court should put off reviewing this issue until it is clear that Ohio is applying federal law or more courts join the split. In this case, no one, save Farris, benefits from this approach. There is already a clear conflict between at least two circuit courts and the Supreme Court of Ohio. Several other courts are also involved in the split. In only two years, at least eight courts have expressed views on the proper interpretation of *Seibert*. The split is real and important. Delaying the resolution of *Seibert*'s application in cases such as this one will only cause more confusion, inappropriately hinder the prosecution of future cases, and ultimately undermine *Seibert*'s holding.

Finally, Respondent's argument that *Seibert* type cases will soon cycle out of the justice system is simply incorrect. This case has substantial recurring importance, and Respondent fails in his attempt to diminish that importance. In fact, the issue arises with regularity. Therefore, this case warrants this Court's review.

Courts are often faced with situations where police officers obtain statements prior to the reading of *Miranda* rights. That is not because officers are unfamiliar with *Miranda*, and it will not be because officers are unfamiliar with *Seibert*. It is because the taking of unwarned statements will inevitably occur in the course of routine police work.

When incriminating statements are unexpectedly made, police officers will then administer appropriate warnings. If an officer repeats the inculpatory admission, the *Seibert* scenario is repeated.

As this Court recognized in *Elstad*, *Miranda* applies only when an individual is in "custody," but "the task of defining 'custody' is a slippery one, and 'policemen investigating

serious crimes [cannot realistically be expected to] make no errors whatsoever." 470 U.S. at 309 (quoting *Michigan v. Tucker*, 417 U.S. 433, 446 (1974)). This case provides an additional example of how officers acting in complete good faith can elicit unwarned statements that lead to derivative evidence. This case, therefore, warrants this Court's resolution. Whatever the merits of Respondent's and the Supreme Court of Ohio's contrary view, this Court alone can resolve the disagreement over the meaning of this Court's precedents.

b. The petition also shows how this case is a valid, useful, and proper vehicle for resolving the question presented. The issue is cleanly presented and outcome determinative. Initially, it is important to see through Respondent's attempt to cloud the fact that the issue presented is one of pure federal law, and the fact that the Supreme Court of Ohio treated it that way. Similar provisions of the United States's Constitution and Ohio's Constitution are harmonized in Ohio. *State v. Robinettee*, 80 Ohio St.3d 234, 239 (1997). While the Ohio Constitution is a document of independent force, for the treatment of similar provisions to diverge there must be persuasive reasons. *Id.* For this reason, the Supreme Court of Ohio clearly identifies when it relies upon state but not federal law for a decision. *See*, Pet App 16a-18a.

The Supreme Court of Ohio never gave a reason to depart from federal law when discussing the issue presented to this Court. In fact, it only departed from federal constitutional law on a separate issue. This occurred after the court's discussion of the issue presented in the Petition. Perhaps the most telling fact is that the Supreme Court of Ohio does not cite a single Ohio case or constitutional provision when analyzing the issue presented to this Court. It only discussed

federal law, because it was only applying federal law (and doing so incorrectly). This case is a proper vehicle for review because no state law determinations cloud the issue presented.

This case is also a proper vehicle to use to determine the issue presented because the statements would not be suppressed under Justice Kennedy's standard because there was no strategy to avoid *Miranda*. *See*, Pet. App. 12a-13a. Further, as explained in the Petition (at 15-16), if Ohio's courts faithfully apply *Elstad*, Respondent's statements are admissible and there is no justification under federal *or state* law to suppress the evidence.

Finally, Respondent's reliance on the State's attempt to have the case remanded to Ohio's appellate court is not relevant at this point. The State was seeking to have the lower courts apply *Seibert* so the Supreme Court of Ohio could review a decision directly considering *Seibert*. The Supreme Court of Ohio decided that was not necessary and reviewed the intervening decision in *Seibert* on its own. Now that the Supreme Court of Ohio has ruled, the State's concern is no longer relevant. Unlike the Supreme Court of Ohio, this Court has a decision directly dealing with *Seibert* and that decision was made after full consideration of the case. The issues that caused the State to seek a remand for further consideration in light of *Seibert* no longer exist. Therefore, the Respondent's reliance on that attempt as a way to demonstrate that this case is a poor vehicle to resolve the important questions it presents is inaccurate. The issue presented warrants this Court's resolution and this case is an ideal vehicle to use for that purpose.

c. As explained in the Petition (at 15-16) Farris's statements should have been admitted under *Elstad* because they were

not obtained through deliberately coercive or improper tactics. Further, overturning the Supreme Court of Ohio will dramatically change the outcome of this case. In order to conceal this fact, the Respondent mischaracterizes the Supreme Court of Ohio's decision to suppress evidence. In order to suppress the evidence, the Supreme Court of Ohio expressly departed from this Court's decision in *United States v. Patane*, 542 U.S. 630 (2004) and created a new Ohio rule mandating the suppression of evidence collected "in defiance of [*Miranda*]." Pet. App. at 18a. If this Court determines that Respondent's post-warning statements are admissible, then even under the new Ohio rule there is no reason to suppress the evidence because it was not collected in defiance of *Miranda*. If Respondent's post-*Miranda* warning statement is admissible, the evidence in this case would again be admissible under the new Ohio rule without any further action. Since this issue is outcome determinative, the Petition should be granted and this issue of law should be resolved.

CONCLUSION

For the forgoing reasons and those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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